BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOYCE L. BURDEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,529
BIG CHEESE PIZZA	)	
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 10, 2011, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on June 17, 2011. E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem in this matter.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an October 12, 2004, accident. In the March 10, 2011, Award, ALJ Clark determined claimant sustained a 15% functional impairment to her left leg and a 15% functional impairment to her right leg and that the back problems claimant may have

are not related to her work-related injury. The ALJ also found that pursuant to K.S.A. 44-511 the two part-time employments in which claimant was engaged at the time of her accident were not the same or similar types of employment and, therefore, claimant's average weekly wage is $123.48. The ALJ limited claimant's permanent partial disability award to the schedules found in K.S.A. 44-510d and denied claimant's request for permanent total disability compensation.

Claimant contends she is entitled to an award of permanent total disability benefits and that her wages with two part-time employers at the time of the accident should be aggregated pursuant to K.S.A. 44-511. Claimant requests benefits for a permanent total disability based upon the workers compensation rate found by the aggregation of claimant's two part-time employments.

Respondent requests the Board affirm ALJ Clark's findings that claimant sustained a 15% functional impairment to each lower extremity at the level of the leg and that claimant's average weekly wage is $123.48.

The issues before the Board on this appeal are:

1. Did claimant suffer a back injury by accident that arose out of and in the course of her employment?

2. What is the nature and extent of claimant's disability?

3. Is claimant permanently and totally disabled as a result of her work-related injuries?

4. What is claimant's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant is 66 years of age and graduated from high school in 1963. She has no other formal education. She began working at the Big Cheese Pizza restaurant in December 1980. Claimant injured her right knee on October 12, 2004, when she grabbed a chair to pull it out from underneath a table in order to vacuum and the vacuum struck claimant's right knee. Claimant felt pain and she reported the injury to her supervisor. She saw Dr. McCue, her family physician, on October 14, 2004, for treatment. Claimant continued working for respondent until March 9, 2005.

At Dr. McCue's recommendation, claimant underwent an MRI of her right knee that indicated she had a torn anterior horn of the lateral meniscus with third degree

degeneration of the medial meniscus. Claimant then saw Dr. John P. Estivo on February 2, 2005. Claimant told Dr. Estivo she had a history of hypertension and back problems. He ordered x-rays and made a diagnosis of internal derangement of the right knee with degenerative joint disease. He offered her the option of arthroscopic surgery.[1]

Dr. Do, an orthopedic doctor, began treating claimant on February 24, 2005. On March 11, 2005, he performed arthroscopic surgery on her right knee with partial medial and lateral meniscectomy, chondroplasty of the patella and intra-articular pain injection. Claimant underwent physical therapy. On July 5, 2005, Dr. Do indicated claimant reached maximum medical improvement (MMI) and he gave her a 15% impairment of function rating to the right lower extremity.[2]

By order of the ALJ, claimant was examined on May 12, 2006, by Dr. C. Reiff Brown, an orthopedic specialist. He diagnosed claimant with preexisting degenerative arthritis in both knees that was apparently aggravated or rendered symptomatic on the right in the October 2004 injury and indicated that in the future, she would likely need a total arthroplasty of the right knee. Further, Dr. Brown stated historically it appeared claimant was aggravating the preexisting degenerative changes in the left knee by overusing the left knee to protect the right knee.[3]

Dr. Do referred claimant to Dr. Cusick, an orthopedic surgeon specializing in joint replacement, who first saw her on August 17, 2006. An MRI of the left knee revealed medial and lateral meniscus tears. On November 13, 2006, Dr. Cusick performed a diagnostic arthroscopy with partial medial and partial lateral meniscectomies on claimant's left knee. After the surgery, claimant continued to have left knee pain and underwent several Synvisc injections. Dr. Cusick determined claimant reached MMI on March 27, 2008.[4]

Although she could not specify the onset date, claimant began having back problems after her left knee surgery.[5] When claimant last testified in July 2010, she described having low back pain that went into her left hip and left leg. Claimant also testified she experiences pain and swelling in both of her knees and that her knees will sometimes buckle without warning. Claimant indicated that as a result of using a cane, she has symptoms in her right shoulder, right wrist, neck and upper back. She also

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[1] Estivo Depo. (Sept. 10, 2010), Ex. 2.

[2] Murati Depo., Ex. 2 at 2; Estivo Depo. (Sept. 10, 2010), Ex. 2.

[3] Brown Report (May 12, 2006) at 3.

[4] Estivo Depo. (Sept. 10, 2010), Ex. 2.

[5] Burden Depo. (Jan. 9, 2009) at 23-24.

experiences pain in her hands from using her cane.[6] Claimant uses a four-pronged cane, which she believes she started using in 2006 while treating with Dr. Cusick.[7]

In 1990, while working for Big Cheese Pizza, claimant's foot went out from under her when she slipped on a wet floor and she injured her lower back. She underwent physical therapy and was given restrictions. Although claimant indicated the pain has never completely gone away,[8] she also testified she was not having any pain in her back immediately before the October 2004 injury.[9] Claimant stated the pain from the 1990 injury was to the right side of her lower back, while the pain she now experiences is located in the left side of her lower back.[10] The record indicates claimant also suffered a work-related injury to her left knee in 1994, but did not seek medical treatment.

On December 10, 2008, at respondent's request Dr. Robert L. Eyster, an orthopedic specialist, examined claimant. He gave claimant a 15% permanent functional impairment to her right knee due to degenerative change and a partial medial meniscectomy and a 15% permanent functional impairment to her left knee. He testified his ratings were in accordance with the AMA *Guides*.[11] He did not assign a permanent impairment rating to claimant's back because he opined her back problems were not attributable to her work-related injury.[12]

Dr. Eyster restricted claimant to: no prolonged stair climbing, squatting, no crawling and rest if she walks for long periods of time. He opined that utilizing the list of claimant's job tasks compiled by vocational expert Steve Benjamin, claimant could no longer perform 12 of 51 non-duplicative tasks, for a 23.5% task loss.[13] This was based upon information that claimant provided to Mr. Benjamin concerning the work tasks she performed in the 15 years prior to her accident. Dr. Eyster indicated he had no idea whether claimant was capable of engaging in substantial and gainful employment but then testified if claimant stayed within his restrictions, she is capable of working.

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[6] Cont. of R.H. Trans. at 51.

[7] *Id.*, at 12.

[8] Burden Depo. (Jan. 9, 2009) at 12-14.

[9] Cont. of R.H. Trans. at 46.

[10] *Id.*, at 43.

[11] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[12] Eyster Depo. at 8-9.

[13] *Id.*, at 13.

Pursuant to an Order of the ALJ, claimant was examined by Dr. John P. Estivo on March 6, 2009. At that appointment, claimant used a cane. Claimant told Dr. Estivo she had lumbar spine pain that began 20 years ago and was treated with epidural injections. Dr. Estivo diagnosed claimant's back problems as "Degenerative disk disease to the lumbar spine with a natural progressing of a preexisting condition."[14] Dr. Estivo had claimant ambulate with and without her cane. He determined she was able to walk well without the cane.[15] He found no evidence of a lower back strain or a hip or neck injury when he examined claimant on March 6, 2009.

Dr. Estivo opined claimant has a 15% permanent functional impairment rating to her right lower extremity – 10% for having undergone a partial medial and partial lateral meniscectomy and 5% for chondromalacia of the patella. He opined claimant has a 10% permanent functional impairment to her left lower extremity for having undergone a partial medial and partial lateral meniscectomy. In his March 6, 2009, report, Dr. Estivo stated he would not relate claimant's lumbar spine pain to her October 2004 injury claim. His ratings were in accordance with the AMA *Guides*.[16]

Dr. Estivo imposed upon claimant restrictions of no kneeling, no ladder climbing, no squatting and should avoid excessive stair climbing. Dr. Estivo testified that based upon claimant's restrictions she could not perform 42% of the work tasks she related to job placement specialist Jerry D. Hardin.[17] However, utilizing the work tasks compiled by Mr. Benjamin, Dr. Estivo opined claimant has a task loss of 11.8%.[18] Dr. Estivo opined claimant is capable of engaging in substantial and gainful employment[19] and is capable of working in a position that is within the restrictions Dr. Estivo gave her.[20]

At her attorney's request, on June 11, 2008, claimant underwent a medical examination by Dr. Pedro A. Murati, a physical medicine and rehabilitation specialist. Dr. Murati was asked to determine if claimant suffered a permanent functional impairment to her lower extremities. He opined she had a 23% functional impairment rating to the right

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[14] Estivo Depo. (Sept. 10, 2010), Ex. 2.

[15] *Id.*, at 9.

[16] Estivo Depo. (Sept. 10, 2010), Ex. 2.

[17] Estivo Depo. (Jan. 7, 2011) at 9.

[18] *Id.*, at 7.

[19] Estivo Depo. (Sept. 10, 2010) at 13.

[20] Estivo Depo. (Jan. 7, 2011) at 12.

lower extremity and a 32% functional impairment rating to the left lower extremity.[21] The report of Dr. Murati contains no mention of complaints by the claimant of neck or back pain.

Claimant underwent a second medical examination by Dr. Murati on November 18, 2009. Dr. Murati assigned 7% permanent impairment for right trochanteric bursitis, 5% for right patellofemoral syndrome and 20% for right knee flexion contracture which combined for a 30% permanent functional impairment rating to claimant's right lower extremity (12% whole body impairment). He opined claimant has a 7% permanent impairment for left trochanteric bursitis, 5% for left patellofemoral syndrome and 10% for left knee flexion contracture which combined for a 20% permanent functional impairment rating to claimant's left lower extremity (8% whole body impairment).[22]

Dr. Murati also diagnosed claimant with low back pain with radiculopathy due to antalgia and left SI joint dysfunction. In essence, he attributes her back pain to an altered gait caused by her knee injuries. Based upon the AMA *Guides*, he opined that because of low back pain and radiculopathy, claimant suffered a 10% permanent impairment to the body as a whole and placed her in DRE Category III. Combining the ratings for claimant's knees and back, Dr. Murati opined she has a 27% permanent functional impairment to the body as a whole.[23] Dr. Murati did not include claimant's bilateral knee surgeries in the November 2009 rating as he anticipated he would be seeing claimant again, opining claimant needed bilateral knee replacements. Including the bilateral partial medial and lateral meniscectomies in assigning claimant's rating, Dr. Murati opined claimant's combined impairment is 32% to the body as a whole.[24]

After his November 18, 2009, examination of claimant, Dr. Murati restricted claimant as follows:

> In her case I recommend no more than four hours of work per day and no bend/crouch/stoop, stairs, ladders, squat, crawl, manual stick shift driving, kneeling or repetitive foot controls with either leg; rarely stand and walk and occasionally sit; no lift/carry/push/pull whatsoever at any time and that she needs to rest every hour for 30 minutes.[25]

Dr. Murati reviewed the list of job tasks that Mr. Hardin compiled. Regarding the task list, the doctor testified:

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[21] Murati Depo., Ex. 2 at 6.

[22] *Id.*, at 20-21.

[23] *Id.*

[24] *Id.*, at 21-23.

[25] *Id.*, at 18.

> Well, I marked an N on those job tasks that I strongly recommend she not perform. And I left those alone where if she is given an opportunity to rest, like I've said, for 30 minutes every hour that she may be able to perform safely. But that's with that caveat.[26]

Looking at the task list that is Exhibit 4 to Dr. Murati's deposition, Dr. Murati marked 26 "N's" out of a total of 38 non-duplicative tasks, indicating a 68% task loss. Dr. Murati indicated that based upon his restrictions, claimant would not be able to engage in substantial and gainful employment.

Claimant testified extensively as to her daily work routine and tasks while employed by respondent. She would open the store, turn on the ovens, make dough, do a money count and set up the salad bar. Claimant also would make pizzas, take orders, serve drinks and food, bus tables, rinse and wash dishes, clean, cook spaghetti, fill the salad bar, vacuum and sweep the floor, clean the game room, take out trash and sometimes make home deliveries of pizza. In the winter claimant might be required to shovel snow from the walk.

Claimant was also employed by Resource Center for Independent Living (RCIL) in October 2004 until her surgery in March 2005 to care for her niece, who uses a wheelchair. After the surgery claimant resumed taking care of her niece for RCIL in June and July 2005. Claimant testified she earned $170.32 per week from RCIL in the 26 weeks preceding her accident.[27] Claimant cooked for and fed her niece, washed the dishes, cleaned, took out her trash, and if necessary, did laundry. Claimant also bathed her niece, which required her to brace herself to bend over, and that bothered her knees. Standing while cooking and washing was the most strenuous activity for claimant's knees when caring for her niece. Claimant would also provide transportation for her niece.

Claimant alleges she performed similar type of work for RCIL as she did at respondent. Claimant testified that 87.5% of the time she worked for respondent, she performed six tasks that were similar to those she performed for RCIL. A co-employee at Big Cheese Pizza, Louise Brock, verified that claimant spent 87.5% of her day completing six job tasks.[28] Claimant asserts the restrictions caused by her work-related accident preclude her from performing her job duties for RCIL and she should be entitled to combine the average weekly wages of both part-time jobs pursuant to K.S.A. 2004 Supp. 44-511(b)(7).

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[26] *Id.*, at 23.

[27] Cont. of R.H. Trans. at 8.

[28] Brock Depo. at 10.

Claimant quit her job with RCIL in July 2005 because her husband underwent surgery. Since his surgery, claimant takes care of him on a daily basis. Claimant testified that her daughter helps with the laundry when she can.[29] Claimant and her husband cook most of their food in the microwave and claimant does the shopping and cleaning. Claimant does assist her husband with bathing and dressing, but does not help lift him.[30]

The task performance capacity assessment of the two vocational experts bears close scrutiny. Claimant's expert is Jerry D. Hardin, a job placement specialist, and he indicated claimant performed 21 non-duplicative tasks while employed by respondent, 13 non-duplicative tasks while employed with RCIL and four non-duplicative tasks while claimant was occasionally employed as an election supervisor for a total of 38 tasks that were not duplicated. Mr. Hardin opined that if the restrictions of Dr. Estivo, Dr. Eyster or Dr. Murati are utilized, claimant is unemployable given her age, education, lack of transferrable skills, and restrictions.

At Mr. Hardin's deposition, claimant introduced a document that purports to prove claimant's work performed at respondent and for RCIL is similar. This document lists six tasks that claimant performed at both jobs. At her job with respondent, these tasks allegedly occupied 87.5% of claimant's workday, while for RCIL, these same tasks took 70% of claimant's time. Mr. Hardin was asked:

> Q. (Mr. Riedmiller) Do you have an opinion within a reasonable degree of vocational expertise as to whether or not the two employments, Big Cheese Pizza claimant was performing on October 12, 2004 and RCIL as that employment was described to you by the claimant is the same or similar employment?
>
> A. (Mr. Hardin) Many of the tasks are the same or similar. She was doing both part-time jobs at the same time and many of the tasks, the essential tasks were the same, even though the titles of the jobs were different.[31]

Respondent's vocational expert, Steve Benjamin, indicated claimant had 51 non-duplicative tasks she performed at her three prior jobs. Mr. Benjamin opined that claimant is employable if Dr. Eyster's or Dr. Estivo's work restrictions are utilized. She could work as a sales clerk and has transferrable supervisory skills. Mr. Benjamin was not asked if the job tasks claimant performed while working for respondent are the same or similar to those she performed for RCIL.

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[29] Cont. of R.H. Trans. at 30.

[30] *Id.*, at 27-28 and Burden Depo. (Jan. 9, 2009) at 8-9.

[31] Hardin Depo. at 21.

The ALJ adopted the opinions of Dr. Eyster and Dr. Estivo that claimant's back problems were not related to her October 2004 work injury. He then adopted the permanent functional impairment ratings of 15% to claimant's right and left knees as opined by Dr. Eyster. The ALJ did not address or make an explicit finding with regard to permanent total disability. Although claimant contended her work for RCIL was similar in nature to her work at respondent as required by K.S.A. 2004 Supp. 44-511(b)(7), the ALJ disagreed. He determined claimant earned an average weekly wage while employed by respondent of $123.48 per week.

Did claimant suffer a back injury by accident that arose out of and in the course of her employment?

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[32] A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[33] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[34]

In order for a claimant to collect workers compensation benefits he or she must suffer an accidental injury that arose out of and in the course of his or her employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[35]

Claimant alleges that she altered her gait as a result of her right knee injury which caused her to subsequently suffer a left knee injury and back injury. Respondent argues claimant's low back condition preexisted her work-related accident and was not aggravated or accelerated by the accident. The ALJ adopted the opinions of Drs. Eyster and Estivo that claimant's back problems are not related to the accident on October 12, 2004.

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[32] K.S.A. 2004 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[33] K.S.A. 2004 Supp. 44-501(a).

[34] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[35] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Dr. Murati examined claimant a second time on November 18, 2009, and opined claimant suffered a back injury as result of an altered gait caused by her knee injuries. Pursuant to the AMA *Guides*, he placed claimant in DRE Category III for a 10% whole person impairment. Dr. Murati was aware of the back injury claimant suffered in 1990. The x-rays taken on March 6, 2009, of claimant's back showed some degenerative changes, but no acute abnormalities.

Drs. Estivo and Eyster opined claimant's back problems were not a result of her work-related injury. Dr. Eyster indicated it is possible but not probable that an altered gait can cause back problems.[36] Dr. Estivo testified that the type of gait claimant had would not cause a back injury.[37] Dr. Eyster indicated claimant did have preexisting degenerative changes to her back, but they were not attributable to her injury.

Claimant has received little, if any, treatment of her back. X-rays of claimant's back reveal degenerative changes only. Dr. Murati's opinions are based on the subjective complaints of claimant. The ALJ weighed the credibility of the physicians and found Drs. Eyster and Estivo to be more credible and this Board agrees. Simply put, the Board finds claimant has failed to meet her burden of proof that she suffered a back injury by accident that arose out of and in the course of her employment.

What is the nature and extent of claimant's disability?

Because this Board finds that claimant did not suffer a back injury arising out of and in the course of her employment, the nature and extent of any functional or work disability from claimant's back injury is moot. The issue then becomes the nature and extent of claimant's disability resulting from her right and left knee injuries. The ALJ relied on the permanent impairment ratings of Dr. Eyster and found claimant has a 15% permanent functional impairment for the loss of use of each leg.

Drs. Eyster and Estivo use a similar methodology to arrive at their opinions. Both look at the fact claimant underwent meniscectomies to her knees. Unlike Dr. Murati, neither Dr. Eyster nor Dr. Estivo indicated claimant has bursitis in her lower extremities or assigns an impairment due to flexion contracture. The Board finds credible the opinion of Dr. Eyster that claimant suffered a 15% permanent impairment to each knee, and affirms the ALJ's Award in this respect.

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[36] Eyster Depo. at 25.

[37] Estivo Depo. (Sept. 10, 2010) at 25.

Is claimant permanently and totally disabled as a result of her work-related injuries?

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The ALJ did not make a finding that claimant is permanently and totally disabled as a result of her work-related injuries. Based on Dr. Eyster's opinion, the ALJ awarded claimant a 15% permanent partial disability to each knee. The Board concludes the ALJ implied that respondent rebutted the presumption that claimant is permanently and totally disabled.

Casco[38] provides:

> When a single injury causes the claimant to suffer the loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof, we apply the *Pruter* analytical model. Our analysis begins with determining whether Casco is permanently and totally disabled. See *Pruter*, 271 Kan. at 875. Because Casco suffers from the loss of both arms, K.S.A. 44-510c(a)(2) establishes a rebuttable presumption that he is permanently, totally disabled. If that presumption is not rebutted by evidence in the record, Casco's compensation must be calculated in accordance with K.S.A. 44-510c as a permanent total disability.[39]

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[40] Because claimant suffered injuries to both lower extremities, K.S.A. 44-510c(a)(2) creates a rebuttable presumption that she is permanently and totally disabled. Claimant asserts she is permanently and totally disabled, while respondent argues it successfully rebutted the presumption through the testimony of its expert witnesses.

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[38] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[39] *Id.*, at 528-529.

[40] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

Mr. Hardin and Dr. Murati opined claimant is incapable of substantial and gainful employment, while Dr. Estivo and Mr. Benjamin disagree. Dr. Eyster indicated he was uncertain if claimant was capable of engaging in substantial and gainful employment, but equivocated by testifying that if claimant stayed within restrictions he assigned her, claimant is capable of working. Dr. Eyster admitted he did not know claimant's education or work experience. On cross-examination he testified that he could not say within a reasonable degree of probability whether or not she is realistically employable.

In determining the ability of a person to obtain substantial and gainful employment, common sense must be applied. Claimant earned $6.80 per hour while working for respondent. She is 66 years of age, has bilateral knee injuries and uses a cane. Claimant's formal education ended in 1963, when she graduated from high school. Claimant has no special training and respondent will no longer employ claimant due to her restrictions. In *Wardlow,*[41] the Kansas Court of Appeals found the totality of a claimant's circumstances, including age, lack of training, past job history, physical activity limitations, and driving and transportation problems, pertinent in determining if he or she is permanently and totally disabled. Based upon claimant's age, education, work experience, injuries and restrictions, this Board finds she is permanently and totally disabled.

What is claimant's average weekly wage?

Claimant asserts she worked two part-time jobs and the work she performed was the same or similar in nature. She contends that pursuant to K.S.A. 2004 Supp. 44-511(b)(7), her average weekly wage should be based upon the aggregate wages from both her jobs. At oral argument, respondent stipulated that claimant's jobs with respondent and RCIL were part time.

The claimant has the burden of proving that while working for respondent she performed the same or similar work that she performed for RCIL. K.S.A. 2004 Supp. 44-511(b)(7) states:

> The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

[41] *Id.*

This Board has previously addressed the issue of whether two part-time jobs are the same or similar in nature. In *Reed*,[42] the Board determined that a maintenance job involving general cleaning was not similar to a job in a school primarily involving the preparation and serving of food, even though the school job involved sweeping, cleaning tables and washing dishes.

Claimant relies on the fact that while working for respondent, she spent 87.5% of her time performing six job tasks, and while working for RCIL, she spent 70% of her time performing those same six tasks. She asserts that because she spent the vast majority of her time at both jobs performing similar tasks, that the wages of both jobs should be utilized to compute her average weekly wage. Mr Hardin opined claimant performed six similar tasks (cleaning, cooking, waiting on customers, answering the telephone, doing laundry and removing trash) at both jobs.

A closer scrutiny of the facts does not support claimant's assertion that she spent most of her time at both jobs performing similar tasks. While claimant cooked food at both jobs, making pizza and maintaining a salad bar at a restaurant are different than making meals for claimant's niece. Taking telephone orders at respondent is different than answering the telephone at a residence. Waiting on customers at a restaurant is not the same or very similar to serving food to claimant's niece. The Board finds claimant failed to meet her burden of proving the work she performed for respondent and RCIL is the same or similar in nature. Therefore, the Board finds claimant's average weekly wage shall be based solely on her earnings from respondent in the amount of $123.48 per week.

CONCLUSION

1. Claimant did not suffer a back injury by accident that arose out of and in the course of her employment.

2. Claimant suffered an injury to her right and left knees which resulted in a 15% permanent functional impairment to each knee.

3. Claimant is permanently and totally disabled pursuant to K.S.A. 44-510c(a)(2).

4. Claimant's average weekly wage is $123.48.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[43] Accordingly, the findings

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[42] *Reed v. USD 453*, No. 256,125, 2003 WL 359858 (Kan. WCAB Jan. 29, 2003).

[43] K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies as follows the March 10, 2011, Award entered by ALJ Clark:

Joyce L. Burden is granted compensation from Big Cheese Pizza and its insurance carrier for an October 12, 2004, accident and resulting disability. Based upon an average weekly wage of $123.48, claimant is entitled to receive the following disability benefits:

For the period through March 10, 2005 (the day before claimant's right knee surgery), claimant is entitled to receive 21.43 weeks of permanent partial disability benefits at $82.32 per week, or $1,764.12, for a 15% functional impairment to the right leg at the level of the knee.

For the period from March 11, 2005, through May 31, 2005, claimant is entitled to receive 11.71 weeks of temporary total disability benefits at $82.32 per week, or $963.97, for the right leg injury.

The period from June 1, 2005, through July 31, 2005, is the approximate period claimant was working part time for RCIL and, therefore, she would not be entitled to receive temporary total disability benefits for said period. For this period, claimant is entitled to receive 2.44 weeks[44] of permanent partial disability benefits at $82.32 per week, or $200.86, for the remaining weeks of disability due for a 15% functional impairment to the right leg at the level of the knee, followed by 6.27 weeks of permanent partial disability benefits at $82.32 per week, or $516.15, for a 15% functional impairment to the left leg at the level of the knee.

For the period from August 1, 2005, through February 20, 2006, claimant is entitled to receive 29.14 weeks[45] of temporary total disability benefits at $82.32 per week, or $2,398.80, for the right leg injury.

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[44] Claimant is entitled to receive a total of 23.87 weeks of permanent partial disability benefits for the 15% functional impairment to the right leg at the level of the knee (the 2.44 weeks here added to the 21.43 weeks noted above equal a total of 23.87 weeks of permanent partial disability benefits for the right leg).

[45] The total number of weeks of temporary total disability benefits is 81.69 weeks. As no dates of temporary total disability benefits were provided, the 81.69 weeks have been divided by 2, resulting in 40.85 weeks for the right leg injury and 40.84 weeks for the left leg injury. The 29.14 weeks here added to the 11.71 weeks noted above equal a total of 40.85 weeks of temporary total disability benefits for the right leg injury.

For the period from February 21, 2006, through November 12, 2006 (the day before claimant's left knee surgery), claimant is entitled to receive 17.60 weeks[46] of permanent partial disability benefits at $82.32 per week, or $1,448.83, for the remaining weeks of disability due for a 15% functional impairment to the left leg at the level of the knee.[47]

From November 13, 2006, through August 25, 2007, claimant is entitled to receive 40.84 weeks of temporary total disability benefits at $82.32 per week, or $3,361.95, for the left leg injury.

Beginning August 26, 2007, claimant is entitled to receive 1,389.03 weeks of permanent total disability benefits at $82.32 per week, or $114,345.32, for a permanent total disability and a total award not to exceed $125,000.

As of August 2, 2011, claimant is entitled to receive 81.69 weeks (40.85 weeks for the right leg and 40.84 weeks for the left leg) of temporary total disability benefits at $82.32 per week in the sum of $6,724.72, plus 47.74 weeks (23.87 weeks for the right leg and 23.87 weeks for the left leg) of permanent partial disability benefits at $82.32 per week in the sum of $3,929.96, plus 205.43 weeks of permanent total disability benefits at $82.32 per week in the sum of $16,911, for a total due and owing of $27,565.68, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $97,434.32 shall be paid at $82.32 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[46] Claimant is entitled to receive a total of 23.87 weeks of permanent partial disability benefits for the 15% functional impairment to the left leg at the level of the knee (the 17.60 weeks here added to the 6.27 weeks noted above equal a total of 23.87 weeks of permanent partial disability benefits for the left leg).

[47] As the actual period from February 21, 2006, through November 12, 2006, has a greater number of weeks than the 17.60 weeks of permanent partial disability benefits allowed for the left leg during this period, there will be a gap in benefits after the 17.60 weeks until the temporary total disability benefits for the left leg begin on November 13, 2006.

Dated this ____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge